

**Before the
Federal Communications Commission
Washington, DC**

In the Matter of)	
)	
Request for Waiver of § 54.503(c)(iv))	FY 2017 FCC Form 470
of the Commission’s Rules)	No. 170048679
)	
Richland County School District One)	CC Docket No. 02-6
Columbia, South Carolina)	
)	
Schools and Libraries Universal Service)	
Support Mechanism)	

REQUEST FOR WAIVER

A representative of the Commission has advised the Richland County School District One (“School District”) that its FY 2017 Form 470 for either a self-provisioned fiber, leased-lit fiber, or leased-dark fiber network does not comply fully with § 54.503(c)(iv) of the program rules, “as clarified,” because it does not also include “Transport Only – No ISP Service” as a service option. We find it impossible to believe that § 54.503(c)(iv) requires “Transport Only – No ISP Service” to be included as a service option on the Form 470 in these circumstances. The plain meaning of the rule, supported by longstanding, well-accepted E-rate program policy and even the *Second E-rate Modernization Order* itself, leads to the complete opposite conclusion. Nevertheless, we have no choice but to file this request.

The School District is in an extremely difficult position. If USAC invalidates the School District’s Form 470 for this reason, the School District will be left without broadband funding for more than a year, unless it can win an appeal before then. The budgetary impact would be harsh to say the least; the impact on learning would be devastating. Therefore, to protect the important interests of the large community it serves, the School District has no choice but to request a waiver of § 54.503(c)(iv) of the Commission’s rules, even though, in its opinion, no waiver is necessary. If it is, then the circumstances certainly warrant one.

Overview

§ 54.503(c)(iv): To the extent an applicant seeks construction of a network that the applicant will own, the applicant must also solicit bids for both the services provided over third-party networks and construction of applicant-owned network facilities, in the same request for proposals;

If a school or library wants to construct its own fiber network, § 54.503(c)(iv) of the rules requires applicants to solicit bids in the same RFP/Form 470 for “the services provided over third-party networks” and the construction of its own fiber network facilities. In this context, the term, “the services provided over third-party networks” obviously refers to broadband over fiber or fiber communications services. It would not make sense otherwise. That is because: (1) the E-rate program famously gives to applicants the freedom to choose whatever eligible, WAN communications technology they want; (2) the purpose of § 54.503(c)(iv) is to ensure that applicants do not construct their own fiber networks if they can lease one more cost effectively; (3) applicants look to § 54.503(c)(iv) for competitive bidding guidance after they have decided on fiber technology for their WAN connectivity; (4) § 54.503(c)(iv) instructs applicants to compare the cost of using a self-provisioned fiber WAN for broadband connectivity against the cost of third party fiber network connectivity; and (5) if the term, “the services provided over third-party networks” included both fiber and non-fiber connectivity, the rule would force applicants to make apples to oranges comparisons about broadband and to consider, and possibly even to purchase, outdated or other technologies in which they have absolutely no interest.

The “clarification” of § 54.503(c)(iv), as described to us, gives the rule an entirely new, different, and unexpected meaning. Under the “clarified” rule, “the services” refers to both fiber and non-fiber communications technologies. This means that applicants seeking to construct their own fiber networks must open up their bidding to non-fiber network solutions, meaning broadband technology in which they have no interest and which, more than likely, cannot come close to matching the speeds they require. The rule as “clarified” forces applicants to make a ridiculous choice: either seriously consider

investing in something they do not want or lose E-rate funding for the fiber communications networks, leased or self-provisioned, that they do.

The logic proffered to us for forcing schools and libraries to request and consider bids for alternatives to fiber technology, notwithstanding that fiber technology is what those schools and libraries have decided best suits their local needs, does not hold up. The logic goes like this:

- Competitive bidding must be open and fair;
- Competitive bidding cannot be open and fair unless it is technology neutral;
- Stating or even implying a bias for or against a particular connectivity solution is not technologically neutral;
- Therefore, a competitive bid in which a preference for fiber connectivity is stated or implied is not open and fair.

This is faulty logic. It is faulty because it is built on the false premise that open and fair competitive bidding requires technological neutrality. It does not. Technological neutrality is what the program requires of the Commission -- not of applicants!

Technological neutrality is one of the E-rate program's most basic precepts, and this particular logic misapplies it completely. When the Commission states that the E-rate program is technologically neutral, it means that, in terms of eligible services, *the Commission* will not favor one technology over another. It does not mean that applicants must remain technologically neutral.

This logic attempts to combine, illogically and without any foundation, two entirely different principles: open and fair competitive bidding by applicants and the E-rate program's technological neutrality, two principles that have nothing whatsoever to do with each other. Back in the day, if an applicant wanted ATM service, the Commission did not require the applicant to request bids on, for example, frame relay service. Or if the applicant wanted a wired LAN, the Commission did not force the

applicant to consider a wireless LAN. It is important not to forget that, in the very first E-rate *Order*, the Commission made a point of giving to applicants the administrative right to decide for themselves what kinds of eligible technologies would best suit their local needs, and, since that time, the Commission has never once looked back.

The proffered logic undermines this bedrock policy. What it either forgets or ignores is that with only a couple of limited exceptions, the program's competitive bidding rules do not kick-in until after the applicant has decided what to buy. In other words, after the applicant selects what to buy from the menu of eligible services, then the competitive bidding rules kick-in, regulating how the applicant may buy them. In terms of what eligible services applicants may consider buying, there are only two limitations that the competitive bidding rules place on them: (1) they may not limit themselves to a single brand of product or service; and (2) where fiber WAN technology is concerned, they must consider either leased lit versus lit dark or self-provisioned versus leased lit and leased dark.

The Commission should not be spending its valuable time relying on faulty logic to reach a result that serves no important public interest and that no one, including the Commission we suspect, even wants. Forcing applicants to ask for bids on broadband transmission technology over third party networks that they have already rejected due to the insufficient speed of those networks, long-term cost, and/or any other good reason or combination of reasons is not good policy. Schools and libraries that choose to participate in the E-rate program should continue to have, as they have had since day one of the program, the complete freedom to decide for themselves the kinds of technologies in which to invest their money and their students' futures.

The E-rate program is technology neutral. And it should remain that way -- in the way that term has always been understood and applied. Furthermore, the program should not be in the business of erecting bureaucratic "gotchas," and that, in our opinion, is exactly what this so-called clarification amounts to. It has done nothing but trip up applicants for no good reason, caused a tremendous amount of frustration and anxiety,

created unnecessary expense, eaten up valuable time, and has the potential to undermine important national broadband policy. Worse, it has the real potential to deprive schools and libraries of the badly needed support they need for high-speed Internet access.

If the Commission agrees with us, we respectfully request that the Commission clarify publicly that § 54.503(c)(iv) means exactly what it plainly appears to mean. If it does not, we respectfully request that the Commission clarify publicly what, in fact, it does mean, and waive § 54.503(c)(iv) and/or any other rule that might need to be waived to ensure that the School District's FCC Form 470 remains valid.

FACTS

On October 25, 2016, the School District posted its FY 2017 Form 470.¹ In that posting, the School District advised the service provider community as follows: "The District is seeking bids for a fiber network. The District is considering Self-Provisioned, lit fiber and dark fiber solutions. See RFP for details." The RFP, which the School District had issued the day before, provided those details.

On October 26th, the day after the School District had posted its Form 470, Joe Freddoso, a USAC fiber networking consultant, emailed the School District's E-rate consultant, Funds For Learning, LLC ("FFL"), to compliment the School District on its fiber network RFP.² "It's really well done," he said, and then went on to provide a few technical comments and suggestions. USAC had hired Freddoso to, among other things, work directly with applicants to help them understand and take advantage of the fiber networking funding opportunities that the Commission's *Second E-rate Modernization Order* ("Second Order") had recently made available to them.

In response to its Form 470/RFP, the School District received proposals and began the time-consuming process of evaluating them. Then, on April 5th, out of the blue, the School District heard from Freddoso again, this time to inform the School District

¹ FCC Form 470 No. 170048679 is attached as Exhibit 1.

² See Exhibit 2, Freddoso's email correspondence to John Harrington, FFL's CEO.

that its fiber-networking bid, which he had described as “well done” in October, was now, five and a half months later, all of a sudden invalid.³ It was invalid because of a clarification made “[i]n early March” to “the posting options for the comparable service to Self Provisioning,” he explained,

According to the clarification, Freddoso said, Form 470s like the School District’s had to include “Transport Only – No ISP” as a service option or else they were invalid. “This [clarification],” he went on to explain, “left projects that filed before the new guidance, like Richland, with an FCC Form 470 that bid incorrect options.” To remedy the “situation,” Freddoso advised the School District, it had two options, both of which came directly from USAC: (1) rebid the contract; or (2) request a waiver from the Commission. Under the circumstances, especially with the window application deadline approaching rapidly and taking local procurement requirements into account, rebidding the contract was a totally unrealistic, not to mention incredibly difficult and burdensome, option.

Because Freddoso did not identify the official source behind the so-called clarification, there was no way of knowing who was responsible for it and how legitimate a requirement it therefore was. Afterwards though, a representative of the Commission in a conversation with FFL’s CEO, John Harrington, confirmed as correct what Freddoso had advised the School District. Because the E-rate program is technology neutral, she explained, applicants may not discriminate against technologies when deciding what eligible services to buy – in other words, applicants interested in self-provisioned fiber networks had to consider third party, non-fiber options too.

DISCUSSION

The School District has been advised of the following: (1) E-rate discounts on fiber networks are only available to applicants who have checked the “Transport Only – No ISP Service” box on the Form 470, *in addition to* checking the boxes for “leased lit,”

³ *Ibid.*

“leased dark,” and “self-provisioned” fiber networks; and (2) applicants who did not check the “Transport Only – No ISP Service” box must request a waiver of § 54.503(c)(iv) of the Commission’s rules in order to validate their Form 470 and remain eligible for FY 2017 discounts on fiber networks.

For the purpose of this waiver request, we have no choice but to assume that what we have been told is correct. We cannot help but wonder, however, whether this is actually the case, as no one in the E-rate community with whom we have discussed this matter – applicants, service providers, associations, and consultants – interprets the Form 470 requirement this way. Not even USAC’s own fiber-networking consultant, Joe Freddoso, who USAC tasked with the job of consulting with applicants about applying for discounts on fiber networks, interpreted it like this. Indeed, he had no idea until sometime in late March when someone at USAC, it appears, advised him that applicants had to check the “Transport Only – No ISP Service” box on the Form 470.

What we find even more perplexing is that the § 54.503(c)(iv) clarification, if true, runs counter to the Commission’s decision in the *Second E-rate Modernization Order* (“*Second Order*”) to give applicants more fiber-related, communications options and the plain meaning of § 54.503(c)(iv), especially considering the *Second Order*’s focus on fiber. This sends an entirely different message about both the Form 470’s fiber-related requirements and the Commission longstanding policy of giving schools and libraries the flexibility to consider and purchase whatever they please, so long as it is eligible and they have the resources to support it.

I. SECTION 54.503(C)(IV) DOES NOT REQUIRE APPLICANTS SEEKING TO CONSTRUCT THEIR OWN FIBER NETWORKS TO SOLICIT BIDS FOR NON-FIBER NETWORK SOLUTIONS TOO.

A. The “Clarification” Is At Odds With Fundamental, E-rate Principles

1. Program Rules Give Applicants The Right To Decide For Themselves What Technologies To Choose And Thus What Eligible Services To Buy.

In the original, 1997 *E-rate Order*, the Commission established a number of guiding principles that have served and continue to serve the program well.⁴ Giving to schools and libraries the flexibility to use E-rate discounts to purchase what they believe will meet their communications needs most effectively and efficiently is one of them.⁵

By forcing applicants to seek bids from literally everyone, including providers of antiquated, unproven, and plainly inadequate technologies in which they have absolutely no interest, the “clarification” of § 54.503(c)(iv) cuts the legs out from under the principle of technological neutrality. In a perfect storm of terrible circumstances, this “clarification” could wind up requiring applicants to enter into contracts for those kinds of services or, at the very least, causing applicants a tremendous amount of difficulty and anxiety during post-commitment audits. This is exactly what the Commission, when it created the E-rate Program, did not want to see happen.⁶

... the establishment of a single set of priorities for all schools and libraries would substitute our judgment for that of individual school administrators throughout the nation, preventing some schools and libraries from using the services that they find to be the most efficient and effective means for providing the educational applications they seek to secure. Given the varying needs and preferences of different schools and libraries and the relative advantages and disadvantages of different technologies, we agree with the Joint Board that individual schools and libraries are in the best position to evaluate the relative costs and benefits of different services and technologies. ... (Emphasis added).

⁴ *Report and Order* (1997), FCC 97-157, 12 FCC Rcd 8776 (1997) DA 97-157 (“1997 Order”) https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1997/fcc97157.pdf

⁵ 1997 Order at para. 431 (*We adopt the Joint Board's recommendation, supported by many commenters, to provide schools and libraries with the maximum flexibility to purchase from telecommunications carriers whatever package of commercially available telecommunications services they believe will meet their telecommunications service needs most effectively and efficiently.*) See Recommended Decision By the Federal-State Joint Board on Universal Service (1996) at para. 461 (*We recognize that all technologies have their advantages and disadvantages and conclude that it would be best to permit individual schools and libraries to evaluate those relative costs and benefits with respect to their individual needs and circumstances.*) https://apps.fcc.gov/edocs_public/attachmatch/FCC-96J-3A1.pdf

⁶ 1997 Order at para 432.

Another one of the program's guiding principles is technological neutrality, which is closely tied to the principle of competitive neutrality.⁷ Technological and competitive neutrality are checks on what the program may do. They prohibit discrimination, respectively, for or against technologies and service providers, insofar as the eligibility of providers and types of eligible services are concerned. They restrict what the program may do, NOT what applicants may do.

The logic behind the “clarification” gets this completely wrong. It confuses the principle of competitive/technological neutrality, which governs who and what will be eligible for universal support, with the program's competitive bidding rules, which govern what applicants' may do after they have decided to enter the marketplace to procure something eligible. The competitive bidding rules prohibit applicants from engaging in anything less than an open and fair competitive bidding process after they have decided what technology they want. The “clarification,” on the other hand, rests on the mistaken premise that the principle of competitive/technological neutrality means that applicants must give all technologies (e.g., fiber and non-fiber communications technologies) equal consideration. That is flat out incorrect. They do not.

In adopting technological neutrality as one of the E-rate program's overarching themes, the Commission made it clear that its intent was to include as wide a variety of services as possible on the menu and to allow applicants to choose whatever they wanted from it. The Commission fully appreciated back in 1998 that technological neutrality might wind up benefiting some providers over others and was perfectly okay with that, leaving the “clarification” no legs to stand on. The following excerpt from the 1997 *Order* does an excellent job of summing this up:⁸

⁷ 1997 *Order* at para. 457 (...Moreover, a situation in which certain technologies were favored over others would violate the overall principle of competitive neutrality adopted for purposes of section 254.)

⁸ *Ibid.* at para. 49. See also para 457 (...Moreover, a situation in which certain technologies were favored over others would violate the overall principle of competitive neutrality adopted for purposes of section 254 If schools and libraries could not receive discounts from telecommunications carriers for internal connections through inside wiring, but could receive discounts from telecommunications carriers if using wireless service for this purpose, however, the discount mechanism would favor wireless technologies over wireline service. Because Congress intended to encourage competitive neutrality among

...Technological neutrality will allow the marketplace to direct the advancement of technology and all citizens to benefit from such development. By following the principle of technological neutrality, we will avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective. The Joint Board correctly recognized that the concept of technological neutrality does not guarantee the success of any technology supported through universal service support mechanisms, but merely provides that universal service support should not be biased toward any particular technologies. We anticipate that a policy of technological neutrality will foster the development of competition and benefit certain providers, including wireless, cable, and small businesses, that may have been excluded from participation in universal service mechanisms if we had interpreted universal service eligibility criteria so as to favor particular technologies....

2. The Second E-rate Modernization Order Did Not Alter or Eliminate Any of the E-rate Program's Fundamental Principles.

In the *Second Order*, the Commission made it crystal clear that it has always been up to applicants to decide what eligible services to buy:⁹

Over the course of the last 18 years, the Commission has recognized the importance of giving local school districts and libraries the flexibility to purchase E-rate supported services that meet their needs.

The “clarification” says the complete opposite. The “clarification” declares that applicants seeking self-provisioned fiber networks must also solicit bids for non-fiber, network technologies, because program rules require them to remain technologically neutral. However, program rules do not require applicants to remain technologically neutral. Therefore, the foundation for the “clarification” completely falls apart.

If we assume for argument's sake that the “clarification” is correct, that would have to mean that Commission decided in the *Second Order* to: (1) change the definition of “technological neutrality;” and (2) stop giving applicants complete flexibility to decide

technologies and because this is an explicit requirement under section 254(h)(2)(A), we conclude that Congress also intended to permit schools purchasing wireline intraschool connections to purchase those services from telecommunications carriers at discounted prices.)

⁹ *In the Matter of Modernizing the E-rate Program for Schools and Libraries, Report and Order and Order on Reconsideration* (2014) (“*Second Order*”) at para. 10.
https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1219/FCC-14-189A1.pdf

what kind of eligible technologies to purchase. This is impossible for us to believe, which is why believe that the “clarification” cannot possibly be correct.

B. The “Clarification” Is Also At Odds With New Policies Adopted In The *Second E-rate Modernization Order*.

In the *Second Order*, the Commission broadly addressed the issue of fiber access to the Internet, deciding to equalize the E-rate program’s treatment of lit and dark fiber and to permit applicants to construct their own or portions of their own fiber networks, if and when that proved to be their most cost-effective solution. The Commission decided this because it understood that applicants were increasingly opting for fiber WAN solutions, and that it made technological, economic, and programmatic sense for them to do so.

The *Second Order* encourages E-rate applicants, who decide they are interested in leased, fiber WAN solutions and self-provisioning, to explore and procure them, but with the caveat that they do so as cost effectively as possible. Accordingly, the *Second Order* requires applicants to compare the costs associated with leased dark fiber versus leased lit fiber and the cost of self-provisioning their own fiber network versus the cost of third-party, fiber network solutions. What it most decidedly does not do, however, is require applicants to compare apples to oranges – that is, to compare fiber and non-fiber solutions. In promulgating these explicit, fiber-related rules, it is obvious that the Commission took the program’s principles of “flexibility to choose” and “technological/competitive neutrality” to heart and into account. It could not possibly have made these decisions otherwise.

With regard to self-construction specifically, which is the issue here, the Commission made it abundantly clear that applicants could choose self-construction only

if and when it was the most cost-effective “fiber” WAN communications option available to them:¹⁰

In allowing self-construction under certain circumstances, we adopt several safeguards to ensure that the self-construction option will be available only when it is necessary to enable applicants to access fiber at cost-effective rates. (Emphasis added.)

In other words, and contrary to what the “clarification” says the rule requires, the Commission ruled that if a school or library decides it wants to operate its WAN over its own fiber, the Commission is not going to second guess that decision by forcing the school or library to consider non-fiber, WAN solutions too. In those circumstances, what the Commission said it would do as a safeguard against overspending is require applicants to also solicit bids for third-party fiber network services and, if one of them turned out to be more cost-effective than self-construction, to choose it. In short, if an applicant decides it wants to build its own E-rate-supported fiber network, it may do so, but only if it can demonstrate that it would be more cost effective to do that than to pay a third-party service provider for the same kind of fiber connectivity that its own network would provide.

Section 54.503(c)(iv) implements the Commission’s decision with respect to the eligibility of self-construction. It says that, “To the extent an applicant seeks construction of a network that the applicant will own, the applicant must also solicit bids for both the services provided over third-party networks and construction of applicant-owned network facilities, in the same request for proposals.” The language is not difficult to understand, especially when read through the lens of E-rate history. From the plain language, it is evident that the reference to “the services” is to fiber communications services, and the

¹⁰ *Second Order* at para. 48

reference to “the services over third party networks” is to fiber communications services, lit or dark, from third-party, fiber communications services providers.

C. The “Clarification” Is Also At Odds With The Instructions on USAC’s Website About How To Complete a Form 470, If You Are An Applicant Considering A Self-Provisioned Fiber Network.

USAC’s instructions to applicants about how to prepare a Form 470 solicitation for a self-provisioned, fiber communications network are consistent with everything we have already discussed above – that is, applicants must do an apples to apples, cost effective analysis by comparing the cost of a self-provisioned, fiber network to other fiber solutions. Seeking bids on non-fiber solutions is unnecessary. These are USAC’s instructions: ¹¹

Applicants considering self-provisioning must solicit bids for both a lit fiber service and a self-provisioned network in the same FCC Form 470, and must provide sufficient detail so that cost-effectiveness can be evaluated based on the total cost of ownership over the useful life of the facility for applicants who pursue the self-provisioning option. Applicants who have received no bids in response to a lit services-only FCC Form 470 posting may seek bids for a self-provisioning option through a second FCC Form 470 posting for the same funding year. [Emphasis added]

USAC’s instructions are especially notable and noteworthy for what they do not include – namely, any indication to applicants seeking bids on a self-provisioned network that they must also seek bids for communications technologies besides fiber [i.e., “Transport Only – No ISP Service”]. Not surprisingly, USAC’s instructions,

¹¹USAC Website: Step 1, Competitive Bidding (last visited May 10, 2017) <http://www.usac.org/sl/applicants/step01/requirements-for-fiber.aspx>); See also USAC’s Website: Before You Begin, Fiber and Fiber Special Construction, <http://www.usac.org/sl/applicants/beforeyoubegin/fiber.aspx>, and Fiber FAQs, <http://usac.org/sl/about/faqs/faqs-fiber.aspx>.

§54.503(c)(iv), and the *Second Order* are entirely in synch, while USAC’s instructions and the “clarification” completely contradict each other.

II. IN VIEW OF THE CONFUSION AND CONTROVERSY SURROUNDING § 54.503(C)(IV), THE COMMISSION SHOULD CLARIFY PUBLICLY THAT IT DOES NOT REQUIRE APPLICANTS SEEKING BIDS ON FIBER NETWORKS TO SEEK BIDS ON NON-FIBER NETWORK SOLUTIONS TOO; IF THIS IS INCORRECT, THE PARTICULAR CIRCUMSTANCES WARRANT A WAIVER OF § 54.503(C)(IV).

A. Because of the “Clarification,” § 54.503(c)(iv) Needs to be Clarified.

The so-called “clarification” of § 54.503(c)(iv) does not actually clarify anything. Instead, it has engendered a tremendous amount of unnecessary confusion, controversy, frustration, and anxiety among school and library administrators. Many millions of dollars are potentially at stake. Broadband for millions of students and library patrons is potentially at stake. This is not an insignificant issue.

The plain language of § 54.503(c)(iv), the *Second Order*, twenty years of E-rate history, and USAC’s Form 470 fiber instructions all support an interpretation of the rule that does not require applicants seeking bids on self-provisioned, fiber networks to seek bids on non-fiber solutions in the same Form 470. Rarely, if ever, are non-fiber solutions going to be able to provide the bandwidth speeds that applicants require or beat the cost of fiber solutions over the long run. Since fiber is the technology those applicants know they want, the Commission should not be forcing them to go through the motions of requesting bids on services that they will not want, and which everyone knows they will never select.

Imagining a realistic scenario in which an applicant in the market for a fiber solution decides instead to go with a non-fiber solution is incredibly difficult, to say the

least. If applicants must go down this make-work, bureaucratic path, we guarantee there will be a nightmare at the end of it, as inevitably mistakes are going to be both made and allegedly made. Many of those mistakes, alleged and otherwise, will one day result in agonizing Commitment Adjustment Decisions, which will be battled over for years.

When a school or library decides on the basis of its own local needs and interests on fiber technology, it should not be forced to check off a box on its Form 470 for non-fiber technology too. That, however, is what the “clarification” requires. Even worse, if the Form 470 has already been posted and that extra box has not been checked, the “clarification” requires USAC to invalidate the form. That is just plain cruel. Therefore, for all of the reasons discussed above, we respectfully request that the Commission make it clear that the E-rate program does not require applicants seeking bids on fiber networks to seek bids on non-fiber network solutions too, and, more specifically, that they do not need to check the box on the Form 470 for “Transport Only – No ISP Service.”

B. Waiver Request

If the Commission concludes that program rules do require applicants seeking bids on self-provisioned, fiber networks to check the “Transport Only – No ISP Service” box on the Form 470, the School District respectfully requests a waiver of § 54.503(c)(iv) and/or whatever other rule or rules need to be waived in order to validate its Form 470.

There is very good cause for waiver in these particular circumstances.¹² The School District could not reasonably have been expected to know of this requirement at

¹² The Commission may waive any provision of its rules for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.

the time it posted its Form 470. USAC's own fiber consultant did not even become aware of the requirement, which he described as "new guidance," until several months after the form had already been posted. Indeed, on the day after the School District posted its Form 470, he complimented the School District on the quality of its RFP. What's more, the School District followed to a tee USAC's instructions on how to complete a Form 470 for a self-provisioned, fiber network, which followed to a tee what the Commission instructed in the *Second Order*. Thus, it should not be surprising that the School District did not include "Transport Only – No ISP Service" as a service option in its Form 470.

Furthermore, the School District was in no position to rebid its contract when this "new guidance" came to light. When it received the news, there was not enough time remaining in the window application period for the School District to issue a new RFP or an amendment to it, wait for new and/or amended responses to arrive, and then, to evaluate and score them. The legal complications involved in such a process was not an insignificant issue either. All of this together made posting a new Form 470/RFP, which is what USAC was advising at the time, a totally impractical solution.

Finally, if the School District's Form 470 is invalidated, the impact on learning will be devastating. The School District will not have the funds to build a fiber network, which would be unfortunate, but, more important, it would have no E-rate support for broadband at all for all of FY 2017. In terms of high-speed access to the Internet, this

WAIT Radio v. FCC, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166. *Accord NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

would considerably reduce what the School District would be able to afford and therefore be able to provide.

Respectfully submitted
on behalf of Richland School District One

/s/ John D. Harrington

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May 17, 2017

ATTACHMENT 1
Form 470



FCC Form 470 – Funding Year 2017

Form 470 Application Number: 170048679

RC17-47001

Billed Entity

RICHLAND COUNTY SCHOOL DIST 1
1616 RICHLAND ST
COLUMBIA, RICHLAND, SC 29201
803-231-7464

Contact Information

Mark Leslie
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803-231-7466

Billed Entity Number: 127145

FCC Registration Number: 0011806338

Application Type

Applicant Type: School District

Recipients of Services:

Number of Eligible Entities: 58

Consulting Firms

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Consultants

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RFPs

Id	Name
19613	RFP 2017-0126 FiberOptic.Amendment 1.111116
20868	RFP 2016-0097, SELF PROV.LIT.DARK FIBER(FINAL) 10-24-16

Category One Service Requests

Service Type	Function	Other	Minimum Capacity	Maximum Capacity	Entities	Quantity	Unit	Installation and Initial Configuration?	Maintenance and Technical Support?	Associated RFPs
Internet Access and/or Telecommunications	Dark Fiber				58	8	Fiber Strands	Yes	Yes	19613, 20868
Internet Access and/or Telecommunications	Self-provisioning		Detailed in RFP	Detailed in RFP	58	Detailed in RFP	Detailed in RFP	Yes	Yes	19613, 20868
Internet Access and/or Telecommunications	Lit Fiber Service		10 Gbps	25 Gbps	58	4	Circuits	Yes	Yes	19613, 20868

Description of Other Functions

Id	Name
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Narrative

The District is seeking bids for a fiber network. The District is considering Self-Provisioned, lit fiber and dark fiber solutions. See RFP for details.

Installment Payment Plan

Range of Years: 1 - 4 Years

Payment Type: Monthly

Category Two Service Requests

Service Type	Function	Manufacturer	Other	Entities	Quantity	Unit	Installation and Initial Configuration?	Associated RFPs
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Description of Other Manufacturers

Id	Name
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Narrative

Technical Contact

State and Local Procurement Restrictions

Questions for the purpose of clarifying any part of this RFP must be delivered, faxed, or e-mailed to: Richland County School District One, Purchasing Services, Attn: LaShonda Outing, CPPB, Procurement Officer, 201 Park Street, Columbia, SC 29201. Fax number (803) 231-7034. E-mail: lashonda.outing@richlandone.org. Questions will be responded to in the form of an Amendment to the RFP and posted to the District website (Procurement) at www.richlandone.org, and available on the Form 470 in EPC.

Recipients of Service

Billed Entity Number	Billed Entity Name
127145	RICHLAND COUNTY SCHOOL DIST 1

Certifications

I certify that the applicant includes:

I certify that the applicant includes schools under the statutory definitions of elementary and secondary schools found in the No Child Left Behind Act of 2001, 20 U.S.C. §§ 7801 (18) and (38), that do not operate as for-profit businesses, and do not have endowments exceeding \$50 million.

Other Certifications

I certify that this FCC Form 470 and any applicable RFP will be available for review by potential bidders for at least 28 days before considering all bids received and selecting a service provider. I certify that all bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology goals.

I certify that I have reviewed all applicable FCC, state, and local procurement/competitive bidding requirements and that I have complied with them. I acknowledge that persons willfully making false statements on this form may be punished by fine or forfeiture, under the Communications Act, 47 U.S.C. §§ 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. § 1001.

I acknowledge that FCC rules provide that persons who have been convicted of criminal violations or held civilly liable for certain acts arising from their participation in the schools and libraries support mechanism are subject to suspension and debarment from the program.

I certify that I will retain required documents for a period of at least 10 years (or whatever retention period is required by the rules in effect at the time of this certification) after the later of the last day of the applicable funding year or the service delivery deadline for the associated funding request. I certify that I will retain all documents necessary to demonstrate compliance with the statute and Commission rules regarding the form for, receipt of, and delivery of services receiving schools and libraries discounts. I acknowledge that I may be audited pursuant to participation in the schools and libraries program. I certify that the services the applicant purchases at discounts provided by 47 U.S.C. § 254 will be used primarily for educational purposes, see 47 C.F.R. § 54.500, and will not be sold, resold or transferred in consideration for money or any other thing of value, except as permitted by the Commission's rules at 47 C.F.R. § 54.513. Additionally, I certify that the entity or entities listed on this form have not received anything of value or a promise of anything of value, other than services and equipment sought by means of this form, from the service provider, or any representative or agent thereof or any consultant in connection with this request for services.

I acknowledge that support under this support mechanism is conditional upon the school(s) and/or library(ies) I represent securing access, separately or through this program, to all of the resources, including computers, training, software, internal connections, maintenance, and electrical capacity necessary to use the services purchased effectively. I recognize that some of the aforementioned resources are not eligible for support. I certify that I have considered what financial resources should be available to cover these costs. I certify that I am authorized to procure eligible services for the eligible entity(ies). I certify that I am authorized to submit this request on behalf of the eligible entity(ies) listed on this form, that I have examined this request, and to the best of my knowledge, information, and belief, all statements of fact contained herein are true.

NOTICE:

In accordance with Section 54.503 of the Federal Communications Commission's ("Commission") rules, certain schools and libraries ordering services that are eligible for and seeking universal service discounts must file this Description of Services Requested and Certification Form (FCC Form 470) with the Universal Service Administrator. 47 C.F.R. § 54.503. The collection of information stems from the Commission's authority under Section 254 of the Communications Act of 1934, as amended. 47 U.S.C. § 254. The data in the report will be used to ensure that schools and libraries comply with the competitive bidding requirement contained in 47 C.F.R. § 54.503. Schools and libraries must file this form themselves or as part of a consortium.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The FCC is authorized under the Communications Act of 1934, as amended, to collect the information requested in this form. We will use the information you provide to determine whether you have complied with the competitive bidding requirements applicable to requests for universal service discounts. If we believe there may be a violation or a potential violation of any applicable statute, regulation, rule or order, the information you provide in this form may be referred to the Federal, state, or local agency responsible for investigating, prosecuting, enforcing, or implementing the statute, rule, regulation or order. In certain cases, the information you provide in this form may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government is a party of a proceeding before the body or has an interest in the proceeding. In addition, information provided in or submitted with this form, or in response to subsequent inquiries, may also be subject to disclosure consistent with the Communications Act of 1934, FCC regulations, the Freedom of Information Act, 5 U.S.C. § 552, or other applicable law.

If you owe a past due debt to the federal government, the information you provide in this form may also be disclosed to the Department of the Treasury Financial Management Service, other Federal agencies and/or your employer to offset your salary, IRS

tax refund or other payments to collect that debt. The FCC may also provide the information to these agencies through the matching of computer records when authorized.

If you do not provide the information we request on the form, the FCC or Universal Service Administrator may return your form without action or deny a related request for universal service discounts.

The foregoing Notice is required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 44 U.S.C. § 3501, et seq.

Public reporting burden for this collection of information is estimated to average 3.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing, and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the reporting burden to the Federal Communications Commission, Performance Evaluation and Records Management, Washington, DC 20554. We also will accept your comments via the email if you send them to PRA@FCC.gov. DO NOT SEND COMPLETED WORKSHEETS TO THESE ADDRESSES.

Authorized Person

Mark Leslie
RICHLAND COUNTY SCHOOL DIST 1
1616 RICHLAND ST
COLUMBIA, RICHLAND, SC 29201
803-231-7466
mark.leslie@richlandone.org

Certified Timestamp

10/25/2016 10:40 AM EDT

ATTACHMENT 2

From: Joe Freddoso [<mailto:Joe.Freddoso@usac.org>]
Sent: Wednesday, October 26, 2016 5:10 PM
To: John Harrington <jharrington@fundsforlearning.com>
Subject: Richland SC FCC form 470 170048679

Hi John,

Hope you are doing well.

I saw this filing and read through the RFP. Its really well done.

A couple of nit things to think about:

- To further distinguish leased dark fiber from self provisioning, USAC is encouraging applicants to use the term leased dark fiber instead of dark fiber in RFPs.
- In the leased dark fiber option, the applicant asks for maintenance and operations to be included in the quote for the leased dark fiber. Review has been focused on separating the lease costs from maintenance and operations costs -- the applicant may want to ask for lease quotes that provide separate line items for the lease cost and the maintenance and operations costs.
- Does the applicant have category 1 network equipment for leased dark fiber or self provisioning? If not, will the applicant bid category 1 network equipment separately if one of these options is the most cost effective solution? The stated USAC preference is to have category 1 network equipment on the same FCC Form 470 as the Leased Lit Service; Leased Dark Fiber; Self Provisioning bid.

Lots of lessons from year 1 -- but from a technical fiber construction perspective this is a really good RFP.

Joe

From: Joe Freddoso [<mailto:Joe.Freddoso@usac.org>]
Sent: Wednesday, April 5, 2017 7:17 AM
To: John Harrington <jharrington@fundsforlearning.com>
Subject: URGENT: Richland SC FCC form 470 170048679

John,

Hope you are doing well.

I wanted to get you an urgent note on this one. In early March, there was a clarification of the posting options for the comparable service to Self Provisioning. The clarification was that applicants must post for Transport Only-No ISP Service as the comparable option to self provisioning. This left projects that filed before the new guidance, like Richland, with an FCC Form 470 that bid incorrect options.

USAC, through fiber manager Bernie Manns, gave me instructions to forward to applicants on how

applicants remedy this situation. Basically there are two options:

Option 1:

To remedy this situation (without seeking a waiver) the applicant **can post another FCC Form 470** that is exactly the same, except with the additional “Transport Only – No ISP Service” dropdown added. (They should request bids for **Self-Provisioned, Lit Fiber Service, Dark Fiber, and Transport Only – No ISP Service on the new 470**) There was discussion whether the consideration of additional technologies would constitute a cardinal change, but as long as nothing else changes, and the 28-day clock starts prior to entering a contract, the applicant **may consider the bids already submitted without requiring those providers to resubmit**. Of course, if they receive any additional bids during the 28-day period following the posting of the additional FCC Form 470, they will need to consider them. That means repeating the cost-effectiveness analysis, and potentially contracting with a different service provider than the one they had already selected (if a more cost-effective option is submitted). Hopefully, this is a feasible option for them, since a more cost-effective bid benefits everyone.

Option 2:

If, for some reason they do not wish to go this route or you feel this causes extreme hindrance on their efforts, they can petition the Commission for a waiver. Please have them reference the link below for information on this process....

<http://usac.org/about/about/program-integrity/appeals.aspx#FCCApeal>

Can you or another team member let me know the status of Richland and if needed which option you will pursue.

Thank you for your kind consideration.

Joe